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RITE AID CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KIMBERLY BEAGLE,

Plaintiff

vs.

RITE AID CORPORATION; and DOES
1 TO 100, INCLUSIVE,

Defendants.

Case No.: CV08-1517-PJH

**DEFENDANT RITE AID
CORPORATION'S REPLY
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RITE AID'S MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER
JURISDICTION (FRCP 12(b)(1))**

Date: Wednesday, June 4, 2008

Time: 9:00 a.m.

Dept.: Courtroom 3, 17th Fl.

I. INTRODUCTION

Plaintiff attempts to make Rite Aid's motion to dismiss about Plaintiff's failure to check a box on the DFEH's complaint form. That is simply not the case. It is Plaintiff's failure to allege in her DFEH complaint *any facts* that could conceivably lead a DFEH investigator to investigate a claim of disability harassment that precludes her disability claim in this lawsuit. Moreover, equity does not allow Plaintiff's disability harassment claim to survive, as Plaintiff has not shown her diligent pursuit of her agency complaint nor any misrepresentation by the DFEH on which she relied. The Court should grant Rite Aid's motion pursuant to Federal Rule of Civil Procedure 12(b)(1),

1 dismissing Plaintiff's disability harassment claim for her failure to exhaust
2 administrative remedies as to that claim and resulting lack of subject matter
3 jurisdiction.

4 II. LEGAL ARGUMENT

5 This motion concerns much more than Plaintiff's failure to check the
6 disability box on her DFEH complaint form; it involves a patent failure by
7 Plaintiff to attempt to allege any claims related to her disability in either her
8 initial nor amended agency complaints. Plaintiff's claim that she either
9 exhausted her administrative remedies or, in the alternative, was excused from
10 doing so is not supported by law or the facts (including the facts in Plaintiff's
11 declaration). First, that Plaintiff annexed a handwritten note to her signed
12 amended complaint does not automatically integrate the content of that note
13 into her amended complaint. Second, just because Plaintiff's alleged disability
14 and the harassment over the disability *followed* the alleged sexual harassment
15 does not make her disability claims like or reasonably related to the sexual
16 harassment that she alleged in her DFEH complaints, such that the disability
17 harassment would necessarily be uncovered in a sexual harassment
18 investigation. Finally, as Plaintiff neither diligently pursued her agency
19 complaints nor relied on any misrepresentations by the DFEH, equity does not
20 excuse Plaintiff's failure to exhaust administrative remedies. The Court should
21 thus dismiss Plaintiff's disability harassment claim, over which it lacks subject
22 matter jurisdiction.¹

23
24 1. Plaintiff suggests, without outright arguing, that the exhaustion of an
25 administrative remedy is a mere procedural prerequisite, and the failure to
26 exhaust administrative remedies does *not* divest a trial court of subject matter
27 jurisdiction. (See Plaintiff's Opposition at page 8, citing *Holland v. Union*
28 *Pacific*, 154 Cal.App.4th 940, 946.) The California appellate court case Plaintiff
cited conflicted with the case cited by Rite Aid, *Okoli v. Lockheed Technical*
Operations Co., 36 Cal.App.4th 1607, 1614 (1995), which specifically holds that
the failure to exhaust administrative remedies as to a claim divests the Court of

1 A. Plaintiff's Handwritten Note Did Not Suffice As a Verified
 2 Administrative Complaint.

3 Although Plaintiff claims that she did expressly include allegations of
 4 disability harassment in her DFEH complaints by the annexing of a
 5 handwritten note vaguely referencing some of the same acts alleged in the
 6 lawsuit, no case law supports her argument. In fact, the California Court of
 7 Appeal held to the contrary, holding that, in light of California Government
 8 Code section 12960's requirement that a DFEH complainant submit a signed,
 9 verified complaint in writing, a letter does not substitute as a formal charge.
 10 (See *Cole v. Antelope Valley Union High Sch. Dist.*, 47 Cal.App.4th 1505, 1515
 11 (1996).) Plaintiff's January 28, 2007 note (attached to her Request for Judicial
 12 Notice as Exhibit A) was unverified. Moreover, although Plaintiff requested that
 13 the DFEH amend the complaint as to whose head went between whose legs,
 14 she did not ask the DFEH to amend the charge to include the acts stated in her
 15 handwritten note. The mere annexing of a note to a verified, written complaint
 16 does not make the allegations part of a complaint. As such, the January 28,
 17 2007 note does not suffice as allegations of disability harassment.

18 B. The Alleged Acts of Disability Harassment in Plaintiff's Complaint
 19 Are Not Like or Reasonably Related to the Acts of Sexual
 20 Harassment Alleged Before the DFEH Simply Because the Former
 21 Followed the Later.

22 Plaintiff non-sensically argues that the acts of disability harassment
 23 alleged in her lawsuit (namely, a manager's act of throwing a doctor's note in
 24 Plaintiff's face and accusing her of forging the doctor's signature) are like or

25 jurisdiction over that claim. In any event, this Court has already settled that
 26 question by its August 13, 2007 holding in *Shek v. Stanford University Medical*
 27 *Center*: "Failure to exhaust administrative remedies before filing a complaint is
 28 a jurisdictional defect and strips the federal court of power to hear the case."
 (See *Shek v. Stanford University Medical Center*, 2007 U.S. Dist. LEXIS 61370,
 4 (Aug. 13, 2007).)

1 reasonably related to the acts of sexual harassment alleged before the DFEH
2 because the disability harassment followed the sexual harassment.

3 First, that argument defies logic; that one act follows another does not
4 necessarily mean that the two are causally related.

5 Second, Plaintiff's argument that an investigation of disability
6 harassment could reasonably be expected to grow out of the DFEH
7 investigation of her very specific allegations of sexual harassment is without
8 legal support. Plaintiff cites only *Sosa v. Hiaoka*, 920 F.2d 1451 (9th Cir. 1990),
9 in support of this argument. However, plaintiff Sosa's purportedly
10 unexhausted claims were about the same protected status (his national origin)
11 as his unchallenged claims. Moreover, the Ninth Circuit found that Mr. Sosa
12 had, in fact, alleged many of the same acts in his administrative complaint that
13 he alleged in his lawsuit. To the contrary, Plaintiff here attempts to add a
14 completely new protected status to the mix – disability. The acts that she
15 alleges in her lawsuit were not mentioned anywhere in Plaintiff's DFEH
16 complaints. Moreover, she did not allege just general "harassment" in her
17 DFEH complaint, which might lead an agency investigator to project the net of
18 his investigation broadly. Instead, Plaintiff alleged in her DFEH complaint *very*
19 *specific* acts of sexual harassment by one individual, Chris Young. Such
20 specific allegations would reasonably lead an investigator to inquire about
21 those acts in particular and not the emotional consequences of those acts to
22 Plaintiff or the acts of harassment by another supervisor related to the
23 emotional consequences of the sexual harassment.

24 Furthermore, the facts stated in Plaintiff's January 28, 2007 note
25 attached to the signed amended complaint do not give the DFEH reason to
26 investigate the purported disability harassment. Again, under *Cole, supra*, an
27 unverified letter does not substitute for a verified, written DFEH charge.
28 Plaintiff's January 28, 2007 scrawled note was unverified and attached to a

1 signed, verified amended complaint. Moreover, although Plaintiff requested
 2 that the DFEH amend her complaint to change the facts as to whose head went
 3 between whose legs, she did not request an amendment to add the alleged acts
 4 of disability harassment. As such, merely by her note, a DFEH investigator
 5 would not reasonably believe that Plaintiff meant to include such a claim in her
 6 complaint, nor would the investigator's inquiry into Plaintiff's very specific
 7 allegations of sexual harassment by one supervisor reasonably expand into an
 8 investigation of the claims in Plaintiff's handwritten note.

9 Plaintiff's claims of disability harassment in her lawsuit are simply not
 10 like or reasonably related to her specific claims of sexual harassment alleged in
 11 her DFEH complaints. That she claims the disability claim – the acts of which
 12 Plaintiff never remotely suggested in her two DFEH complaints – sprung from
 13 the sexual harassment described in the DFEH complaints does not mean that a
 14 DFEH investigation would have reasonably encompassed investigation of the
 15 disability harassment. The Court should dismiss Plaintiff's disability
 16 harassment claim.

17 C. Equity Does Not Excuse Plaintiff's Failure to Exhaust Her
 18 Administrative Remedies as to the Disability Harassment Claim.

19 No equitable principle excuses Plaintiff's failure to allege any acts of
 20 disability harassment in either of her two DFEH complaints.

21 Equitable principles may save a claim from dismissal for failure to
 22 exhaust administrative remedies when the plaintiff: 1) diligently pursued her
 23 discrimination claim; 2) was misinformed or misled by the administrative
 24 agency responsible for processing his charge; 3) relied on the misinformed or
 25 misrepresentations of that agency, causing her to fail to exhaust her
 26 administrative remedies; and 4) was acting *pro se* at the time. (See *Rodriguez*
 27 *v. Airborne Express*, 265 F.3d 890 (9th Cir. 2001), citing *Denney v. Universal*
 28 *City Studios, Inc.*, 10 Cal.App.4th 1226, 1233-1234 (1992).) In *Rodriguez*, the

1 Ninth Circuit reversed the dismissal of the plaintiff's disability discrimination
 2 claim on failure to exhaust administrative remedies grounds. (*See id.*) The
 3 court held that a triable issue of fact existed as to whether equity excused the
 4 plaintiff's failure to allege disability discrimination in her DFEH complaint
 5 when he presented evidence that the DFEH investigator specifically told him
 6 that he could not allege a disability claim. (*See id.* at 902.)

7 Plaintiff meets only the last of the four *Denney* requirements. She did
 8 not pursue her discrimination claim diligently, in that she did not seek to
 9 amend her charge to "correct" a critical fact (*i.e.*, whose head went between
 10 whose legs) until *eight months* after the filing of the initial charge, and then did
 11 not ask that the amended complaint also contain facts of disability
 12 harassment. Plaintiff's lack of diligence is also demonstrated by her failure to
 13 *twice* inform the DFEH of the alleged acts of disability harassment (during the
 14 creation of the initial and amended charges), even though these acts of
 15 harassment occurred in August 2005, nearly a year before the filing of the
 16 initial charge.² Moreover, Plaintiff does not argue in her opposition brief that
 17 the DFEH gave her *any* misinformation. That Plaintiff says in her opposition
 18 brief that she had the unexpressed "intention" that the January 28, 2007 note
 19 supplement the amended complaint does not make the supplementation
 20 complete. However, the note does not say that Plaintiff wished to charge Rite
 21 Aid with disability harassment. Plaintiff appears to claim that the DFEH
 22 "misrepresented" that the disability claim would be added to her amended
 23 complaint by simply not saying anything in response to her January 28, 2007
 24 note; however, the mere failure to speak does not equal a misrepresentation,
 25 particularly when Plaintiff's note did not clearly express Plaintiff's desire to add

26
 27 2. See Plaintiff's letter of March 4, 2007, attached to her Request for Judicial
 28 Notice as Exhibit E, for reference to August 2005 events. See also Exhibit C,
 Plaintiff's initial DFEH charge filed on June 9, 2006, nearly a year after the
 claimed August 2005 events.

1 the facts within the note to her amended complaint. If Plaintiff wanted to add
2 claims of disability harassment to her DFEH complaint, she knew who at the
3 DFEH to contact and how to accomplish the amendment. She did not take any
4 action to add facts of disability harassment to her DFEH complaint, through no
5 fault of the DFEH.

6 As such, equity does not save Plaintiff's disability harassment claim from
7 dismissal for her failure to exhaust administrative remedies as to it.

8 III. CONCLUSION

9 Contrary to Plaintiff's argument, it is not merely the failure to check a
10 box on the DFEH complaint form that dooms Plaintiff's disability harassment
11 claim for failure to exhaust administrative remedies. It is also her failure to
12 take any action to assert facts of disability harassment in neither her initial nor
13 amended DFEH complaint. The sexual harassment allegations in her DFEH
14 complaints – very specific allegations of acts by a particular supervisor – are
15 not like or reasonably related to the acts by a different supervisor of disability
16 harassment that she alleged in her lawsuit. Moreover, her failure to include in
17 her DFEH complaints any acts of disability harassment was through no
18 misrepresentation by the DFEH. The Court should dismiss Plaintiff's disability
19 harassment claim for her failure to exhaust administrative remedies.

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21 DATED: May 21, 2008

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23 /s/ Annmarie M. Liermann
24 JONATHAN ALLAN KLEIN
25 ANNMARIE M. LIERMANN
26 Attorneys for Defendant
27 RITE AID CORPORATION
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